NO. 79-1061

FEB 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES L. MAEHREN, et al.,
and JOHN R. CHURCH, et al.,

Petitioners,

v.

CITY OF SEATTLE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF WASHINGTON

RESPONDENT CLAUDE HARRIS' BRIEF IN OPPOSITION

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ABCD AT CRAFTSMAN PRESS, SEATTLE

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Respondent, Claude Harris respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of the State of Washington in this case. No one's rights were violated. Seattle is

attempting to solve its problems and this Court ought not to interfere.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported in 92 Wn.2d 480, 599 P.2d 1255 (1979).

JURISDICTION

The Supreme Court of the United States lacks jurisdiction of the Church, et al v. City of Seattle case because there is no "case or controversy" as required by Article III of the Constitution. While a live controversy existed at the time of the filing of a complaint, such controversy must be extant at all stages of appellate or certiorari review. Preiser v. Newkirk, 422 U.S. 395, 401, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975); Steffel v. Thompson, 415 U.S. 452, 459 n. 10, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974); Roe v. Wade, 410 U.S. 113, 125, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); SEC v. Medical Committee for Human Rights, 404 U.S.

403, 30 L. Ed. 2d 560, 92 S. Ct. 577 (1972); United States v. Munsingwear, Inc., 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950).

Appendix A, a recent affidavit of Respondent Claude Harris clearly demonstrates that no petitioner in the Church case has any standing to sue in this Court.

Petitioners in Church v. City of Seattle, sought injunctive relief to cancel the appointment of Claude Harris to Batallion Chief claiming that they were higher on the referral list and thus they would be in contention for an appointment if his selection was nullified. Since then, all of the named plaintiffs have been appointed to battalion chiefs (see Appendix) and so there is no justiciable controversy between the parties and the Supreme Court, by Article III of the United States Constitution, lacks jurisdiction.

In DeFunis v. Odegaard, 416 U.S. 312, 40 L. Ed. 2d 764, 94 S. Ct. 1704 (1974) an unsuccessful

white applicant for admission to law school objected that the admission of less qualified minority students deprived him of constitutional rights, but a stay pendente lite permitted him to enter and take the necessary courses. This Court held the case moot because the plaintiff would complete law school within two months "regardless of any decision this Court might reach." 416 U.S. at 319.

QUESTIONS PRESENTED

1. Whether selective certification as a method of increasing minority representation in employment, where discrimination has been found to have existed is violative of the 14th Amendment to the Constitution?

2. Whether selective certification as a method of increasing minority representation in employment, where discrimination has been found to have existed is violative of Title VII of the Civil Rights Act of 1964 as amended in 1972?

3. Whether beneficiaries of selective certification have to in fact be themselves victims of discrimination in their employment?

4. Whether it is permissible to determine racial imbalance in employment by the geographic area comprising the municipality?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and statutory provisions are involved: The United States Constitution Article III, Section 2, regarding case and controversy requirement, the equal protection clause of the XIV Amendment; Title VII of the 1964 Civil Rights Act as amended in 1972 (Title 42, Section 2000e-2) regarding racial classification.

COUNTERSTATEMENT OF THE CASE

Initially there are two misleading statements in petitioner's appeal that should be cleared up. "The City of Seattle grants preference solely on the basis of race for Civil Service employment and promotion." (Petitioners' Brief pp. 2-3.) That

statement is so patently false as to obviate a response. Another statement, "The trial court found that petitioners had presented a prima facie case of racial discrimination against them." The trial court had denied a motion to dismiss at the end of petitioners' case because he felt there was a possible constitutional violation.

Petitioners brought this action challenging the City of Seattle's affirmative action plan as implemented in the Seattle Fire Department.

In 1972 the Seattle City Council passed an ordinance providing for implementation of affirmative action programs in each City department. The ordinance recognized that minority employment levels, including management, were at such a level as to indicate substantial discrimination, and that certain City personnel practices acted as unnecessary barriers to minority employment.

The affirmative action plan of the Fire Department as with that of other City departments approves the use of "selective certification" as

the method for increasing the levels of minority employment in City departments.

The Seattle City Charter provides that promotions be made from the top five or top 25% of those individuals passing the appropriate civil service examination. These individuals are then certified for promotion to the department head, who must then make the selection from among the certified individuals.

In 1971 the Seattle Civil Service Commission, pursuant to rule making power granted by the Seattle City Charter, adopted Rule 7.03j which provided for selective certification as a procedure for certifying the highest ranking minority candidates on the eligibility register. The process of selective certification adds the highest ranking eligible minorities to the pool of candidates from which the department head makes the hiring decision.

The Seattle Civil Service Commission at the time it adopted the Selective Certification resolution had evidence of and recognized that its civil

service tests had in some cases discriminated against minority candidates and caused them to be placed at the lower ends of the eligibility registers, therefore denying them the opportunity to be employed and promoted.

The trial court and the Washington State Supreme Court stressed that the civil service examinations in question were not fully validated, but only content validated. (92 Wn.2d 480, 498)

The Washington State Supreme Court further noted that the trial court had found that the civil service examinations continued to adversely impact minorities, and that the content validation method used by the City was often inadequate, suspect, capable of bias, and challenged by the EEOC. (92 Wn.2d 480, 498)

Respondent, Claude Harris, a black firefighter who was then a Captain took and passed the civil service examination for Fire Battalion Chief in 1974. Thereafter three positions for Battalion Chief became available, and the Civil Service

Commission made the regular certification and a selective certification of Claude Harris.

From the list of certified candidates, the Seattle Fire Chief appointed two candidates from the regular certification list and Claude Harris to the three positions.

It should be stressed that the Fire Chief considered Claude Harris fully qualified (RP 476, 477) and in fact, Claude Harris had been "acting Battalion Chief for three years". (RP 463)

Contrary to petitioners' contention, that there was no evidence that Mr. Harris had been the victim of discrimination, Mr. Harris testified that the Battalion Chief exam and certain other factors in the promotion process were discriminatory towards him. (RP 435, 422, 443)

Statistics produced at trial indicated minorities have been significantly underrepresented in the Seattle Fire Department. In 1965, only three minorities (.3%) were employed in the Department, at a time when 8.4% of the Seattle population was

minority. In 1972, 6.2% of the department employees were minorities, although minorities were 14.5% of the Seattle labor force. In 1974, 7.6% of the department employees were minorities as compared with 16.0% in the labor force. In 1976 minorities constituted 9.4% of the department employees as compared to 16.6% of the labor force (see Ex. 44).

This condition of underrepresentation of minorities has been even more pronounced in the case of administrative and managerial positions.

ARGUMENT

1. The Decision of the Washington State Supreme Court Is in Accord With the Fourteenth Amendment to the United States Consitution and Selective Certification Does Not Violate the Fourteenth Amendment.

The Washington State Supreme Court held that in view of the underrepresentation of minorities in the Fire Department, and particularly in administrative and managerial positions, the City's

interest in employing selective certification was compelling. 92 Wn.2d 480, 493.

The court noted that in Regents of the University of California v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), Justice Powell suggested that a government interest in remedying the effects of past discrimination cannot be compelling without a judicial, legislative, or administrative finding of constitutional or statutory violation. The court went on to point out that even though that view was not the opinion of this entire Court, the case at bench would meet that test. The Equal Employment Opportunity Commission formally charged the City with violating Title VII in 1973, concerning the use of discriminatory civil service tests. Furthermore, the Washington court found the City's practices to be violative of Title VII in Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976). (92 Wn.2d 480, 493 n.10) Additionally, Seattle's affirmative action plan was founded upon a legislative determination

by the Seattle City Council that the City's past employment practices had discriminated against minorities.

In Regents of the University of California v. Bakke, supra, a majority of this Court held that the Equal Protection clause of the Fourteenth Amendment does not prohibit the consideration of race in affirmative action plans. In that case four members of this Court were of the opinion that the special admissions program at the University of California, Davis Medical School was not violative of the Equal Protection clause of the Fourteenth Amendment. That program reserved sixteen positions out of the entering class of 100 for qualified minority applicants. Minority applicants were free to compete for any of the 100 openings in the entering class, however, non-minorities were precluded from competing for the sixteen positions reserved for minorities.

Although Justice Powell could not justify upholding this particular affirmative action plan

he agreed with four others that the Equal Protection clause does not prohibit the University from establishing race conscious plans. Justice Powell reasoned that in an acceptable race conscious plan,

> . . . race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.

438 U.S. 265, 317, and

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.

438 U.S. 265, 318.

The affirmative action plan of the City of Seattle meets the concerns of Justice Powell. The Seattle plan does nothing more than to place a qualified minority in a pool from which a final promotion decision is made by the head of the department. Non-minorities are not foreclosed from consideration for all available positions.

Justice Powell also found fault with the Davis Medical School plan in that there had been no prior finding of discrimination by a judicial, legislative, or administrative body. Justice Powell stated that:

> After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively or administratively defined.

438 U.S. 265, 307-308.

As pointed out, supra, the Seattle City Council, the Equal Employment Opportunity Commission, and the Washington Supreme Court have all made determinations that personnel policies of the City of Seattle were violative of Title VII.

In view of these determinations, the City of Seattle had a compelling interest in taking affirmative action to eliminate the effects of discrimination in City personnel matters.

In Lindsay v. Seattle, supra, the court in upholding Seattle's affirmative action plan stated:

> The fact that the City voluntarily has sought to achieve equality of employment opportunity in the public sphere rather than by court order does not detract from or lessen the legal validity and necessity of its affirmative action program under Title 7. Voluntary compliance, rather than court ordered relief, is the congressionally preferred method of achieving equality of employment opportunity.

86 Wn.2d 698, 706.

The court did not hold that Title VII "required" the City to utilize the type of affirmative action plan in operation.

The case at bench, is not, as petitioner contends, a situation where affirmative action has been utilized without any prior established history of racially discriminatory conduct.

The affirmative action plan implemented by the City of Seattle was instituted as a result of a legislative determination of discriminatory employment practices. Since voluntary action is the preferred method of compliance with Title VII, the City was not required to wait for remedial action

ordered by a court. Seattle's affirmative action plan is a temporary measure gauged toward increasing minority representation in City employment. The plan as implemented does not mandate the hiring or promotion of minority candidates over non-minority candidates. It is a device to insure that a qualified minority will be considered in the promotion process. The City's interest in implementing the plan was compelling. It is also structured to achieve its goals while at the same time respecting the interests of non-minorities to the greatest extent possible.

There is no conflict between the decision of the court below and the Fourteenth Amendment to the Constitution of the United States.

2. The Decision of the Court Below is in Accord With Decisions of This Court as to the Extent to Which Municipal Employers Can Utilize Racial Preference in Affirmative Action Programs and Is Not Violative of Title VII.

The cases cited by Petitioners to support their contention that the method utilized by the City of Seattle's affirmative action plan are in

conflict with the decisions of this Court are not on point. Each of the cases cited by Petitioner involve remedial measures taken by the trial court in the context of a finding of discrimination against the employer. They do not involve the validity of an affirmative action plan voluntarily adopted by the employer to remedy the effects of past discrimination.

The validity of a voluntarily adopted affirmative action plan was upheld by this Court in United States Steelworkers of America v. Weber, ___ U.S. ___, 61 L. Ed. 2d 480, 99 S. Ct. ___ (1979). After noting that since these were private parties, no equal protection issue was present, this Court held that Title VII of the Civil Rights Act of 1964 did not prohibit such a plan. It was stressed that the legislative history and the language of the act itself supported the view that voluntary efforts to remedy discrimination were preferred by the act, and an interpretation of the act prohibiting all voluntary race conscious

affirmative action must be rejected. Although this Court did not attempt to draw the line between permissible and impermissible affirmative action programs, the program in question was acceptable. This Court did mention various attributes of the plan in question: it was designed to break down old patterns of hierarchy; to open up employment opportunities to blacks in areas traditionally closed to them; it did not unnecessarily affect the interest of white employees; it did not require discharge of white workers; it did not constitute an absolute bar to advancement of white workers; and the plan was temporary. 61 L. Ed. 2d 480, 492.

Although the Washington State Supreme Court recognized that since the City of Seattle was a public body the decision in United States Steelworkers of America v. Weber, supra, was of limited applicability, differences in that plan and the Seattle plan were of interest.

Most important, although the plan in Weber required the admission of one black for every white

admitted to the program, selective certification only allowed certain qualified minorities to be considered for an available position. Furthermore, the Seattle plan does not cause anyone that is otherwise eligible for consideration to lose that position. The final decision remains discretionary with the department head. Although individuals in the top 25% of those passing the exam had a right to be considered for the position, they had no reasonable expectation of actually receiving the position. As such it cannot be said that any non-minority employees were displaced. Furthermore, as was pointed out in Lindsay v. Seattle, supra, where the court considered the same affirmative action plan as that considered in the case at bench, the affirmative action plan is temporary in nature and:

> Once a fair approximation of minority representation in city employment consistent with the population mix in the area is achieved, affirmative relief is no longer necessary or appropriate. [Citing cases].

86 Wn.2d at 707.

As the Washington State Supreme Court emphasizes, the petitioners were in no way victimized by the plan. The only justifiable expectation they could hold was that they would be considered for the job along with all others eligible for consideration, including those selectively certified.

The statistical data, and data related to civil service testing, considered by the court below, and the trial court, presents ample justification for a conclusion that minorities have been grossly underrepresented in the Fire Department, and that the civil service exams have had an adverse impact on minorities. The individuals receiving selective certification in the case at bench were subject to those civil service exams.

The court held that in view of these discriminatory practices proof of individual victimization was unnecessary. The court noted with interest that in United Steelworkers v. Weber, supra, this Court found that exclusion from various crafts on racial grounds was a proper subject for judicial

notice, 61 L. Ed. 2d 480, 486 n.1, and thereafter did not discuss the issue of actual victimization. 92 Wn.2d 480, 505, n.14.

3. Beneficiaries of Affirmative Action Need Not Prove That They Themselves Have Been Discriminated Against.

At the outset, respondent, Claude Harris does claim to have been discriminated against in the past for promotion within the Seattle Fire Department.

However, the trial court held that it was unnecessary to prove actual victimization.

The Washington Supreme Court pointed out that the instant case, unlike United States Steelworkers of America v. Weber, ___ U.S. ___, 61 L. Ed. 2d 480, 99 S. Ct. ___ (1979), does not involve a quota. Selective certification neither guarantees the promotion of any particular individual nor assures that a certain numerical goal of minority representation will be reached. "This clearly is not a quota". 92 Wn.2d 480, 503.

> A request for selective certification therefore does not cause anyone otherwise

> eligible to lose their eligibility and appellants do not so contend. Selective Certification simply increases the number of candidates, it does not replace non-minority candidates with minority candidates and appellants do not claim otherwise . . . Thus, the use of selective certification does not cause existing employees to be displaced, call for the firing or promotion of unqualified persons, or create an absolute preference for minorities to the exclusion of non-minorities.

92 Wn.2d 504, 505.

The Washington State Supreme Court in its brilliant, well-reasoned opinion prefaced its opinion thusly:

> At the outset we emphasize that this case does not involve a loss of acquired seniority rights, the displacement of non-minority employees by minority employees, or the downgrading of non-minority employees to favor minority employees. Further, the case does not involve the promotion of non-qualified minority employees in place of qualified non-minority personnel. All personnel, both minority and non-minority, have successfully completed the civil service examinations. The name of each man has been advanced to the civil service register as eligible for promotion to the positions in question. In short, this case involves promotion to vacant positions within the Fire Department.

92 Wn.2d 480, at 483.

The Washington Supreme Court held in this case:

> Under the circumstances of this case and in light of the proof of past and continuing discriminatory practices by both the City and the Fire Deprtment, we hold that proof of actual personal victimization of a minority employee is not a prerequisite to the application of affirmative relief in the form of selective certification. It is sufficient that those benefitted (sic) by selective certification are within a class of persons identified by Rule 7.03j as likely to have been the victims of discrimination. Our holding is consistent with a number of cases declining to require proof of specific acts of discrimination against each beneficiary of affirmative action. Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977); Equal Employment Opportunity Comm'n v. American Tel. & Tel. Co., 556 F.2d 167 (3rd Cir. 1977); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).

(Emphasis supplied), 92 Wn.2d 480, 505.

If the discrimination against a particular class is found legislatively and judicially to exist, it seems superfluous to require every member of the class to prove individual cases of discrimination.

4. The Decision of the Court Below Is In Accord With the Decisions of This Court On the Use of Statistics to Establish Racial Discrimination in Employment Within Geographic Area of the Municipality.

In support of its position that the court below used an improper statistical base to establish discrimination, petitioner cites Hazelwood School District v. United States, 433 U.S. 299, 52 L. Ed. 2d 768, 96 S. Ct. 2736 (1977). In Hazelwood this Court stated at 433 U.S. 312, 313:

> It is thus clear that a determination of the appropriate comparative figures in this case will depend upon further evaluation by the trial court. As this court admonished in Teamsters: "[S]tatistics . . . come in infinite variety . . . [T]heir usefulness depends on all of the surrounding facts and circumstances". 431 U.S. at 340, 52 L. Ed. 2d 396, 97 S. Ct. 1843. Only the trial court is in a position to make the appropriate determination after further findings. And only after such a determination is made can a foundation be established for deciding whether or not Hazelwood engaged in a pattern or practice of racial discrimination in its employment practices in violation of the law.

In Hazelwood this Court agreed that the statistical base was the relevant labor market for

school teachers in the area, but after listing certain factors that should be considered, remanded to the trial court for further findings.

In the case at bench, the court below, in upholding the trial court's finding that the City of Seattle was the relevant labor market, noted that the majority of the city's work force is drawn from Seattle. The court went on to state that:

> It is also of interest to note that even if we were to adopt appellants' broader concept of "relevant work force" the statistics at hand still demonstrate that minority employees are substantially underrepresented in upper level positions within the Seattle Fire Department. In the final analysis these are the positions with which we are primarily concerned in this case.

92 Wn.2d 480, 497.

In a number of employment discrimination cases involving police and fire departments the courts of appeals have approved the use of a statistical base comparing minority representation in the department with the minority population in the city served by the department. Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974); Afro American

Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974); Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971). In United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert den., 404 U.S. 984, the court approved the use of the City of Seattle as the statistical base for minorities in the labor force where the union maintained its hiring halls, training centers and main offices in the city. The court noted that although the union's jurisdiction extended outside the city, the city was where the vast majority of individuals for apprenticeship programs would be drawn.

The determination of the trial court and the Washington State Supreme Court was that the evidence supported a conclusion that the City of Seattle was the relevant labor market. That

determination was reasonable under the circumstances and in keeping with Hazelwood, supra.

CONCLUSION

For the reasons stated this Court ought to deny the petition for certiorari.

Respectfully submitted,

LEMBHARD G. HOWELL

Attorney for Respondent
Claude Harris

January 30, 1980

APPENDIX

STATE OF WASHINGTON)
:ss
County of King)

CLAUDE HARRIS being first duly sworn on oath states: I have served as an acting Battalion Chief and a Battalion Chief for a period of three years and one month continuously in the capacity of Chief of Personnel with the Seattle Fire Department.

I am the intervenor in the King County Superior Court action entitled John R. Church, et al v. City of Seattle, Cause No. 820122, and Respondent in the same action in the Supreme Court of the State of Washington, No. 44975.

All of the plaintiffs in the Church action to-wit: John R. Church, Jack G. Dial, Stuart G. Lorimer, Roger L. Ramsey, and Edward J. Shaw have been promoted to Battalion Chief as were three others from the attached Exhibit A to this affidavit, to-wit: Roderick B. Bower,

Albert T. Sprague and your affiant.

CLAUDE HARRIS

Subscribed and sworn to before me this 30th day of January, 1980.

Notary Public for the State of Washington, residing at Redmond

March 1975

Promotional Register for BATTALION CHIEF

1.	Bower, Roderick B.	76.18
2.	Sprague, Albert T.	76.01
3.	Ramsey, Roger	73.70
4.	Dial, Jack G.	73.16
5.	Lorimer, Stewart J.	72.40
6.	Church, John	72.27
7.	Shaw, Edward J.	72.16
8.	Hanson, Bobby Lee	72.05
9.	Minteer, Frank	71.07
10.	Kirlin, Donald	71.06
11.	Carpenter, Earl H.	70.07
12.	Brooks, John A.	70.00
13.	Bickford, Les D.	69.20
14.	Ayers, Donald	68.97
15.	McLaughlin, Ron	68.87
16.	Bruckshen, Terry	68.54
17.	Stevens, Robert E.	68.44
18.	McNerney, John M.	67.71
19.	Fletcher, Edwin L.	67.15
20.	Halbert, Leonard C.	67.10
21.	Miller, Dale A.	66.97
22.	Harris, Claude	66.45
23.	Horton, Blaine H.	64.25
24.	Harshfield, Frank	60.67
25.	Wold, Ron G.	60.63

Exhibit A